FOR ARGUMENT

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1978

#78-744

UNITED STATES OF AMERICA,
Petitioner,

-VS-

CHARLES TIMMRECK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF THE QUESTION

Where the facts underlying a 28 USC §2255 motion to vacate indicate that at the time Respondent offered his guilty plea: (1) he indicated to the trial judge a lack of knowledge of the possible consequences of his plea; (2) the trial judge advised Respondent he "could serve as long as 15 years in jail" but, in violation of F R Crim P 11, failed to advise him that a custodial sentence on the offense to which he was pleading guilty must also include a special parole term of not less than three years in addition to whatever custodial sentence was imposed; and (3) because of the nature of the special parole term, the sentence imposed of ten years imprisonment and five years special parole actually subjected Respondent to potential combined prison and parole custody of virtually twenty years; where no other remedy is available; and where there has been no claim that: (1) Respondent would, in fact, have continued with his guilty plea had he been fully advised of its consequences; (2) Respondent, who was not advised of his right to appeal at the time of sentencing, deliberately bypassed his right to appeal; (3) the interval between the time of sentencing and the filing of the motion to vacate was for purposes of delay; or (4) the government's ability to prosecute anew has been in any way affected by that interval, Respondent is properly entitled to §2255 relief.

COUNTER-STATEMENT OF THE CASE

1. On May 24, 1974, Respondent Charles Timmreck pled guilty in the United States District Court for the Eastern District of Michigan to conspiracy to distribute a controlled substance in violation of 21 USC §846. At the time Respondent offered his guilty plea, he was questioned by the district judge as to his understanding of certain of the rights he was waiving. The judge stressed that "what I want to get at and be sure of is that you fully understand what you are doing" (A-3). He questioned Respondent and his counsel as to Respondent's understanding of his rights (A-4), and he asked Respondent about his understanding of the possible punishment involved. Respondent replied that he was *not* aware of the possible consequences of his plea:

> THE COURT: Now, if I accept your plea of guilty, Mr. Timmereck [sic], do you know what the possible consequences of a plea of guilty to Count I of this Indictment could be in terms of punishment?
>
> THE DEFENDANT: *No, sir.*
>
> THE COURT: Have you been told that you could serve as long as 15 years in jail and be subjected to a substantial fine, and I believe the fine is $25,000. Have you been told that?
>
> THE DEFENDANT: *I have now, yes.*
>
> THE COURT: *Now you know?*
>
> THE DEFENDANT: *Yes, sir.*
>
> (A-4-5) (emphasis added)

At no time during the hearing did the court advise Respondent that a custodial sentence for the offense to which he was pleading would also require a mandatory special parole term of at least three (3) years or up to life or that violation of the special parole term at any point during the term could result in imprisonment for the entire term of

the special parole and not just the unexpired portion. At the conclusion of the hearing, the court accepted Respondent's plea (A-9-10).

2. On September 19, 1974, Respondent was sentenced to ten (10) years imprisonment, a five thousand ($5,000.00) dollar committed fine and a special parole term of five (5) years. At the time of sentencing, Respondent was not advised of his right to appeal.

3. On September 13, 1976, pursuant to the provisions of 28 USC §2255, Mr. Timmreck filed an Amended Motion to Vacate Guilty Plea, alleging that his plea had been accepted in violation of F R Crim P 11 for the reason that the district judge had failed to advise him of the mandatory special parole provisions of 21 USC §841(b) accompanying any prison sentence for violation of 21 USC §846. Although the government opposed Respondent's Motion, it made no claim that Respondent would have continued with his plea had he been fully advised of its consequences, that Respondent deliberately bypassed his right to appeal, that the interval between the time of sentencing and the time of filing the motion was for purposes of delay, or that the government's ability to prosecute anew was in any way affected by the interval.

After hearing and oral argument, on December 3, 1976, the district judge entered an Opinion and Order denying Respondent's motion. 423 F Supp 537.

On June 12, 1978, the Court of Appeals for the Sixth Circuit reversed the judgment of the district court and remanded the cause with instructions to vacate the sentence entered upon the guilty plea and allow Respondent to plead anew. 577 F2d 372.

On January 8, 1979, this Court granted certiorari. US , SCt , 59 LEd2d 30.

This is the Brief of Respondent.

SUMMARY OF ARGUMENT

28 USC §2255, "the judicial method of lifting undue restraints upon personal liberty," exists to provide a flexible means of providing substantive justice for persons held in federal custody in violation of the Constitution or laws of the United States. In the absence of harmless error or deliberate bypass of the right to appeal, its availability is not reduced by the non-constitutional basis of a claim for relief.

Because of the extent to which the federal system relies on guilty pleas to conclude criminal prosecutions, maintenance of the principles underlying the adversary system requires that the system's interest in finality of judgments be secondary to insuring the availability of relief for persons prejudiced by errors at their guilty plea hearings. While §2255 relief is only appropriate where the error involved is a fundamental defect, a non-harmless violation of F R Crim P 11 is such a defect, entitling a §2255 petitioner to relief.

Requiring a §2255 petitioner to show particular prejudice before relief will be granted would impose an almost impossible burden and would involve the district courts in subjective, highly speculative and time-consuming litigation unlikely to produce effective or uniform enforcement of Rule 11.

As of fiscal 1978, §2255 motions constituted only 1.4% of the civil caseload of the district courts, the number of such motions filed increasing only 5.6% over the past four years. During the same period, the total number of civil cases filed increased 34%.

Respondent, who at the time of offering his plea advised the district judge of his unawareness of the consequences of his plea, was in fact prejudiced by the district judge's failure to advise him concerning the mandatory special parole term. The sentence imposed subjected Respondent to a potentially greater term of total custody than he was advised. Respondent was not advised of his right to appeal, there has

been no claim of deliberate bypass of the right to appeal or purposeful delay in requesting §2255 relief, and the government has neither claimed nor established harm to its ability to prosecute anew upon the granting of §2255 relief. Respondent is properly entitled to §2255 relief.

ARGUMENT

WHERE THE FACTS UNDERLYING A 28 USC §2255 MOTION TO VACATE INDICATE THAT AT THE TIME RESPONDENT OFFERED HIS GUILTY PLEA: (1) HE INDICATED TO THE TRIAL JUDGE A LACK OF KNOWLEDGE OF THE POSSIBLE CONSEQUENCES OF HIS PLEA; (2) THE TRIAL JUDGE ADVISED RESPONDENT HE "COULD SERVE AS LONG AS 15 YEARS IN JAIL" BUT, IN VIOLATION OF F R CRIM P 11, FAILED TO ADVISE HIM THAT A CUSTODIAL SENTENCE ON THE OFFENSE TO WHICH HE WAS PLEADING GUILTY MUST ALSO INCLUDE A SPECIAL PAROLE TERM OF NOT LESS THAN THREE YEARS IN ADDITION TO WHATEVER CUSTODIAL SENTENCE WAS IMPOSED; AND (3) BECAUSE OF THE NATURE OF THE SPECIAL PAROLE TERM, THE SENTENCE IMPOSED OF TEN YEARS IMPRISONMENT AND FIVE YEARS SPECIAL PAROLE ACTUALLY SUBJECTED RESPONDENT TO POTENTIAL COMBINED PRISON AND PAROLE CUSTODY OF VIRTUALLY TWENTY YEARS; WHERE NO OTHER REMEDY IS AVAILABLE; AND WHERE THERE HAS BEEN NO CLAIM THAT: (1) RESPONDENT WOULD, IN FACT, HAVE CONTINUED WITH HIS GUILTY PLEA HAD HE BEEN FULLY ADVISED OF ITS CONSEQUENCES; (2) RESPONDENT, WHO WAS NOT ADVISED OF HIS RIGHT TO APPEAL AT THE TIME OF SENTENCING, DELIBERATELY BY-PASSED HIS RIGHT TO APPEAL; (3) THE INTERVAL BETWEEN THE TIME OF SENTENCING AND THE FILING OF THE MOTION TO VACATE WAS FOR PURPOSES OF DELAY; OR (4) THE GOVERNMENT'S ABILITY TO PROSECUTE ANEW HAS BEEN IN ANY WAY AFFECTED BY THAT INTERVAL, RESPONDENT IS PROPERLY ENTITLED TO §2255 RELIEF.

The relief available to federal prisoners pursuant to 28 USC §2255 exists to help insure the capacity of the legal system to provide substantive justice. Along with its common law antecedent writ of habeas corpus, §2255 has become "the judicial method of lifting undue restraints upon personal liberty." *Price* v *Johnston*, 334 US 266, 269, 78 SCt 1049, 92 LEd 1356, 1361 (1948). While most frequently utilized to challenge the constitutionality of restraint, its uses are flexible.

As described by Mr. Justice Frankfurter in dissent in *Sunal* v *Large*, 332 US 174, 187, 67 SCt 1588, 91 LEd 1982, 1991-1992 (1947), the writ is

> "a swift and imperative remedy in all cases of illegal restraint" . . . fluid and free from the definiteness appropriate to ordinary jurisdictional doctrines. (citation omitted)

The "well-worn formula[e]" that habeas corpus "will not be allowed to do service for an appeal," *Sunal* v *Large*, *supra*, 332 US at 178, 91 LEd at 1986, and that not every asserted error of law may be raised on a §2255 motion, cf. *Hill* v *United States*, 368 US 424, 82 SCt 468, 7 LEd2d 417 (1962), have generally been held to bar relief only where the right to appeal has been deliberately passed up, e.g., *Sunal*, *supra*, or where the error was harmless to the accused, e.g., *Hill*, *supra*. See also Note, "Developments in the Law—Federal Habeas Corpus," 83 Harv L Rev 1038, 1067-1068 (1970). Where such circumstances are absent, relief may not be denied merely because the violation asserted is non-constitutional in origin. As this Court stated in *Davis* v *United States*, 417 US 333, 345, 94 SCt 2298, 41 LEd2d 109, 118 (1974):

> There is no support in the prior holdings of this Court for the proposition that a claim is not cognizable under §2255 merely because it is grounded in the "laws of the United States" rather than the Constitution.

Where the error alleged is of significance to the legal system as a whole, there is particular reason for §2255 relief to be available.

Because the strength of our system of criminal law is directly proportional to the degree to which the presumption of innocence is protected at trial, the practice of concluding most criminal prosecutions by pleas of guilty potentially threatens the foundations of the adversary process. As this Court noted in *McCarthy* v *United States*, 394 US 459, 463, 89 SCt 1166, 22 LEd2d 418, 424 (1969) at n7, the vast majority of federal prosecutions are resolved by pleas of guilty. In fiscal 1978, for example, 85.2% of all federal convictions were obtained by pleas of guilty or nolo contendere. *1978 Annual Report of the Director of the Administrative Office of the United States Courts* at 114; see also figures for fiscal 1977 and 1976, Brief for the United States at 37, n24.

Offering a plea of guilty relieves the government of its burden of proof, as the defendant expressly or impliedly waives all of her or his constitutional, statutory and court-rule-created rights and convicts himself or herself out of her or his own mouth. As such, the "fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all" accused persons. *Notes of the Advisory Committee on 1966 Amendments to F R Crim P.*

In addition, because F R Crim P 32(a) (2) does not require the sentencing judge to advise a defendant who has pled guilty of the right to appeal, the likelihood of correction on direct appeal of errors committed at guilty plea hearings is reduced, and the potential threat to the system is enhanced.

For these reasons, maintenance of a forum for the correction of errors committed at guilty plea hearings is of particular significance to the legal system.

In order for a guilty plea to be voluntary, the accused must be "fully aware of the direct consequences" of the plea, *Brady* v *United States*, 397 US 742, 755, 90 SCt 1463, 25 LEd2d 747, 760 (1969), including not only the maximum sentence and fine to which he or she is exposed but also any applicable mandatory special parole term.[1] This follows because the special parole term is a " 'factor that necessarily affects the maximum term of imprisonment.' " *Bunker* v *Wise*, 550 F2d 1155, 1158 (9th Cir 1977), citing *United States* v *Myers*, 451 F2d 402, 404 (9th Cir 1972).

The mandatory special parole term, whose "nature and operation . . . are very different" from traditional parole, *Bunker* v *Wise, supra*, 550 F2d at 1158, "place[s] a number of onerous burdens on the liberty of paroled individuals," *United States ex rel. Baker* v *Finkbeiner*, 551 F2d 180, 184 (7th Cir 1977), and substantially enhances the total possible period of incarceration faced by a plea-offering defendant. Depending on the nature of the offense involved, it must be for at least two or three years in length, 21 USC §841(b) (1) (A) and (B), and it may be for as long as life. Cf., e.g., *United States* v *Rea*, 532 F2d 147 (9th Cir 1976). Violation of the special parole term at any point during the term potentially subjects the defendant to incarceration for the entire period of the special parole term. 21 USC §841(c). Moreover, the risk of further incarceration is significant: "[A] substantial number of parolees . . . return to prison for parole violations. Many of these violations are inevitably technical rather than criminal." *United States ex rel. Baker* v *Finkbeiner, supra*, citing *President's Commission on Law Enforcement and Justice, Task Force Report: Corrections* (1967) at 62 and Note, "Parole: A Critique of Its Legal Foundations and Conditions," 38 NYU L Rev 702, 721 (1963).

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[1]The government concedes the special parole term to be a "consequence of the plea" within the meaning of Rule 11 as then in effect. Brief for the United States at 13.

For these reasons, failure to advise an accused of the mandatory special parole term accompanying any custodial sentence for violation of 21 USC §846 deprives the accused of highly significant information relative to the potential term of imprisonment faced and fundamentally undercuts the voluntariness of his or her plea.

Similar to its argument in this case, the government argued in *McCarthy* that substantial compliance with the provisions of F R Crim P 11 ought to be a sufficient record of voluntariness in the absence of a showing of prejudice by the defendant. This Court rejected that argument, holding that

> *prejudice inheres in a failure to comply with Rule 11*, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. 394 US at 471-472, 22 LEd2d at 428 (emphasis added)

The Court also stressed that requiring a showing of prejudice would involve the courts in an after-the-fact fact-finding process in a " 'highly subjective area' " and would encourage unwarranted speculation as to whether the defendant's plea was otherwise truly voluntary. 394 US at 469-471, 22 LEd2d at 427-428.

Relying on *Davis* v *United States, supra*, the government now argues that regardless of *McCarthy*, a showing of particular prejudice ought to be required in collateral attacks to federal guilty pleas. The government's reliance on *Davis* is misplaced.[2]

[2]In support of its argument, the government attempts to align the Third Circuit with those circuits supporting its position. Brief for the United States at 26-27, n13. To the contrary, *Horsley* v *United States*, 583 F2d 670 (3d Cir 1978), cited by the government, makes clear that the Third Circuit's interpretation of *Davis* is virtually identical with that of the Sixth Circuit in the instant case.

The government is also in error in suggesting, *Id.*, that *United States* v *Tursi*, 576 F2d 396 (1st Cir 1978), *Marshall* v *United States*, 576 F2d 160 (9th Cir 1978), and *Hitchcock* v *United States*, 580 F2d 964 (9th Cir 1978), (Continued on page 11)

Davis involved a §2255 challenge to a conviction coming after a trial, with Davis' claim based on an intervening change in the law. Echoing the language of prior cases, cf., e.g., *Hill* v *United States, supra*, 368 US at 428, 7 LEd2d at 421, and cases cited therein, this Court held that in such a case, the "appropriate inquiry" is "whether the claimed error of law was a 'fundamental defect which inherently results in a complete miscarriage of justice' . . . 'and presents exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.' " 417 US at 346, 41 LEd2d at 119.

Where a trial has occurred, the defendant has been convicted in an adversary proceeding by evidence presented by the government in open court. Presumably, all pre-trial and trial issues of law and fact have been determined after a full hearing at which the defendant has been represented by counsel competent and eager to attack, weaken and discredit the government's case. The defendant has confronted his or her accusers in open court and subjected them to probing cross-examination, and he or she may have offered exculpatory evidence as well. Because of the more thorough and protracted fact-finding process, less errors are likely to have been prejudicial.

In addition, the *Davis* test is substantially parallel to the "plain error" rule of F R Crim P 52(b) governing reversal on direct appeal in cases where no objection has been made at trial. Cf., e.g., *United States* v *Atkinson*, 297 US 157, 160, 56 SCt 391, 80 LEd 555, 557 (1936); *Kyle* v *United States*, 402 F2d 443 (5th Cir 1968); *Harris* v *United States*, 297 F2d 491 (8th Cir 1961); *Jackson* v *United States*, 179 F2d 842 (6th Cir 1950). *Davis*, therefore, does not create a new standard on collateral review where no objection has been made. Since cases involving guilty pleas almost invariably do not include

none of which involves a failure to advise a guilty-pleading defendant of the penal consequences of his or her plea, in any way foreshadow a change of position on the issue at bar by either the First or Ninth Circuit. Cf. *United States* v *Yazbeck*, 526 F2d 641 (1st Cir 1975); *Bunker* v *Wise*, 550 F2d 1155 (9th Cir 1977).

an objection at the trial court level, *Davis* cannot reasonably be argued as creating a new standard of review for collateral challenges to guilty pleas. Reevaluation of prior decisions on the basis of *Davis* is, therefore, unnecessary.

Rather, because of the different circumstances surrounding a defendant who has pled guilty, and because of the large incidence of guilty pleas in the federal system, procedures which do not insure meticulous compliance with Rule 11 threaten the requirement of thorough, knowing voluntariness and consequently jeopardize the integrity of the adversary process itself. In the absence of a showing of harmlessness,[3] a defect in a guilty plea is in and of itself sufficiently prejudicial to require the granting of collateral relief.

Requiring a petitioner to show particular prejudice would be unsound. While an objective standard may sometimes require the granting of relief in a case where a plea might nevertheless have been offered, it is the only way of insuring that relief will be granted in all cases where the plea would not have been offered. As Judge Boreman noted for the Fourth Circuit in *Paige* v *United States*, 443 F2d 781, 783 (4th Cir 1971):

> . . . there is no way by which the effect of the court's misleading statement upon the voluntariness of Paige's guilty plea could be determined. Whether Paige would have elected to plead not guilty and put the government to proof of his guilt had he known the full consequences of pleading guilty to a second narcotics offense is a matter of pure speculation.

See also *McCarthy*, *supra*, 394 US at 465, 22 LEd2d at 425; *United States* v *Yazbeck*, 524 F2d 641, 643-644 (1st Cir

[3]Cf., e.g., *Hill* v *United States*, *supra* (motion treated as Rule 35 motion to correct sentence; violation of F R Crim P 32(a) not inherently prejudicial; no prejudice alleged); *United States* v *Ortiz*, 545 F2d 1122 (8th Cir 1976) (prosecutor advised defendant of mandatory special parole term in the presence of the court).

1975); *Bell* v *United States*, 521 F2d 713, 716-717 (4th Cir 1975) Widener, J., concurring and dissenting.

Carrying the burden of showing prejudice would also be "an almost impossible task". *United States* v *Carper*, 116 F Supp 817, 820 (DDC 1953) (re violation of F R Crim P 6(d)). Accused persons plead guilty for many reasons, some of them bizarre and irrational to judges and counsel regularly involved in the criminal process. In some cases, defendants would, in fact, have decided to proceed to trial if they had known the additional possible prison time faced for violation of special parole, but in most of those cases, they may be unable to establish that that lack of knowledge was critical to their decision to plead guilty.

In addition, then-District Judge, now-Circuit Judge Tamm, noted in *Carper*, *supra*, that a requirement of showing prejudice would also

> undermine the purpose, effectiveness and value of the Criminal Rules by judicial legislation which, in effect, would be saying that the Rules do not mean what they clearly and unequivocally state. *Id.*, 116 F Supp at 819

It would also make more difficult the achievement of uniform federal criminal procedure. *Id.*, 116 F Supp at 821.

For reasons similar to those indicated above, the time lapse between time of sentencing and time of filing a §2255 petition is immaterial to the question before the Court. Any number of valid reasons lie behind delays in bringing §2255 petitions, including lack of understanding of one's legal rights. Cf. F R Crim P 32(a)(2). Perhaps more importantly, though, Congress has expressly elected not to set a limit on the time within which such a petition may be filed. In the absence of a statutory change, this Court should not impose a limitation where Congress has chosen to impose none.[4, 5]

[4]An unsuccessful effort to impose a time limit was, in fact, made by Representative Sumners of Texas, who introduced HR 6723 during the

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As Chief Justice Burger stressed while a circuit judge, dissenting in *Bostic* v *United States*, 298 F2d 678, 681 (DC Cir 1961),

> . . . passage of time, whether five years or twenty-five years, cannot affect valid claims under §2255. That is what Congress meant and that is as it should be.

See also *Brown* v *Allen*, 344 US 443, 500, 73 SCt 397, 97 LEd 469, 511 (1953).

While the availability of §2255 relief cuts against the system's interest in finality, "arrayed against [this] interest . . . is the very purpose of the writ of habeas corpus—to safeguard a person's freedom from detention in violation of constitutional [or legal] guarantees." *Blackledge* v *Allison*, 431 US 63, 72, 97 SCt 1621, 52 LEd2d 136, 146 (1977). Moreover,

> [a]dmirable as may be the effort toward system, this last resort for human liberty cannot yield when the choice is between tolerating its wrongful deprivation and maintaining the systemist's art.
>
> . . . Beside executing its great object, . . . considerations of economy of judicial time and

1946 session of Congress while consideration was pending of proposals eventually leading to 28 USC §§2254 and 2255. That bill would have imposed a filing deadline of one year after either the passage of the act, the discovery by the movant of the facts relied upon for relief or a change in the law relied upon for relief.

[5]The government's suggestion that a defendant who has just been sentenced "should be instantly aware" that he or she has been given an unexpectedly severe sentence and should, therefore, be required either to file a Rule 32(d) motion to withdraw the plea or take a direct appeal, Brief for the United States at 34, is palpably unrealistic. Regardless of whether imprisonment is anticipated, after sentence is imposed a person sentenced to a lengthy term of custody cannot reasonably be expected immediately to focus on, comprehend and develop legal strategy concerning a special parole term.

> procedures, important as they undoubtedly are, become comparatively insignificant. *Sunal*, *supra*, 332 US at 188-189, 91 LEd 1992-1993, Rutledge, J., dissenting.

See also Note, 83 Harv L Rev, *supra*, at 1058.

An objective test also furthers, rather than hinders, the objective of finality and produces less, rather than more, litigation. By adhering to an objective standard, lower courts are relieved of time-consuming hearings on the question of prejudice. Counsel for both parties are readily able to determine whether an asserted violation is meritorious. Where an objective test is applied, government attorneys also have a greater incentive to be fully attentive at guilty plea proceedings and to advise the court of any failures or omissions in the guilty plea record. Cf. *United States* v *Timmreck*, *supra*, 577 F2d at 377. Addressing itself to this point, the Third Circuit recently concluded,

> we do not believe the interests of justice are served by tolerating or condoning failure to implement Rule 11. Strict and consistent adherence to the requirements of Rule 11 will facilitate disposition of post-conviction assertions of error in the change of plea proceeding because the record will provide a clearer answer to any objections raised. *Horsley* v *United States*, 583 F2d 670, 675 (3d Cir 1978).

It is also significant that the number of §2255 motions filed is small enough not to generate administrative difficulties. In 1978, §2255 motions accounted for only 1.4% of the total civil actions commenced in the district courts. In the past four fiscal years the number of §2255 motions filed has increased only 5.6%, 1,822 in 1974 to 1,924 in 1978.[6] In contrast, the 138,770 civil cases filed in fiscal 1978 represented a 34% increase over the 103,530 cases filed in

[6]These figures include all motions to vacate, those based upon convictions following trials as well as those based upon guilty pleas.

1974.[7] Additionally, only 343 appeals from decisions on §2255 motions were filed in the courts of appeals in 1978, 2.2% of all cases appealed. *1978 Annual Report of the Director of the Administrative Office of the United States Courts* at 46, 60, 76.

Nor is reduction of the sentence to comport with the advice given at the time of the plea an adequate remedy. Cf. Brief for the United States at 28. n15. "Rule 11 entitles the accused to know the consequences of his guilty plea *prior* to the time of entering it so that he might accurately assess such consequences in making his determination," *United States* v *Smith*, 440 F2d 521, 526 (7th Cir 1971), and the legal basis of the plea itself is vitiated by the failure fully to advise the accused of his or her plea's consequences. Because the nature and conditions of the special parole term are unique, their impact on the decision to plead guilty ought not be underestimated. Cf. *Paige* v *United States*, *supra*. Moreover, reduction of the sentence would frustrate the intent of Congress that a special parole term shall follow any custodial sentence imposed for violation of 21 USC §846.

The error involved here was neither merely technical nor harmless to Mr. Timmreck: the prejudice was not only "inherent," it was actual. At the time he appeared before the district judge to offer his plea, Mr. Timmreck clearly did not know the consequences of his plea (A-4-5).[8] Advised only of

[7]By way of further contrast, over the same period of time the percentage of social security cases increased 77% (3,585 to 9,950), the percentage of mortgage foreclosure cases increased 42% (2,938 to 4,159), and the percentage of labor cases increased 38% (5,400 to 7,461). *1978 Annual Report of the Director of the Administrative Office of the United States Courts* at 60.

[8]Toward the conclusion of the guilty plea hearing the trial judge asked defense counsel whether counsel was of the opinion that Mr. Timmreck "knows full well the consequences of a plea might be," to which counsel replied, "That's correct" (A-9). At the September 8, 1976, hearing on Respondent's motion to vacate the district judge asked counsel whether he had discussed with Mr. Timmreck the provisions of the special parole term. Although agreeing with the court that it was not a part of his custom

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a possible prison sentence of fifteen years plus a fine, he was, in fact, given a sentence exposing him to potential combined prison and parole custody of virtually twenty years[9] plus a fine. His plea was offered on the basis of a significant misunderstanding generated by the trial judge, and it is mere speculation that he would have continued to offer his plea had he been accurately informed of its consequences.

At the time of sentencing, Mr. Timmreck was not advised of his right to appeal, and there is no claim on this record that he either knew of or deliberately bypassed that right. Similarly, there has been no claim that the interval between the time of sentencing and the time of filing the motion to vacate was for purposes of delay.

The government has not claimed or demonstrated an inability to prosecute anew, and given that the bulk of its evidence was obtained through court-approved electronic surveillance, cf. *United States* v *Schebergen*, 353 FSupp 932 (ED Mich 1973) [Mr. Schebergen was the first-named defendant in this case.], it is highly unlikely that re-prosecution would be impaired.

For all these reasons, the error involved here was neither technical nor harmless but was a fundamental defect in the

not to explain to a client the sentencing implications of a guilty plea, counsel stated that he could not recollect whether he had expressly advised Mr. Timmreck of the special parole requirements involved here (A-20-21).

The government alleges that these statements establish the violation to have been technical. It is clear, however, that Mr. Timmreck's counsel did not recall whether he had advised Mr. Timmreck of the special parole term. Additionally, even if counsel had so advised Mr. Timmreck, it is also clear that at the time Respondent appeared in court to offer his guilty plea, he was, in fact, unaware of the consequences of his plea (A-4-5).

[9]On the sentence imposed, Mr. Timmreck was, in fact, subject to ten years initial imprisonment, four years, eleven months and twenty-nine days special parole supervision and five years imprisonment for violation of the special parole term, a combined prison and parole custody of twenty years less one day.

proceedings below and Mr. Timmreck is properly entitled to §2255 relief.

CONCLUSION

For all the reasons stated above, the decision of the Court of Appeals should be affirmed or, in the alternative, the writ of certiorari should be dismissed as improvidently granted.*

Respectfully submitted,

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Dated: March 28, 1979

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*In the event the judgment of the Court of Appeals is not affirmed, Respondent should be entitled to an opportunity to allege and establish the facts necessary to warrant the granting of his motion.